From: "Jason Halpern" <jason.halpern@aexp.com>
To: <secretary@fmc.gov>
Date: Thu, May 29, 2003 12:55 PM
Subject: American Express Comments to NPRM to Amend Rules of Public Law89-777 [Docket No. 02-15]

Dear Mr. VanBrakle:

Please find attached to this email, a document containing a two (2) page cover letter and six (6) pages of comments from American Express Travel Related Services Company, Inc. regarding the Federal Maritime Commission's Notice of Proposed Rulemaking to amend rules pertaining to Sections 2 and 3 of Public Law 89-777. We appreciate the opportunity to provide comments to your office.

You will also receive an overnight package tomorrow containing 15 copies of the attached document.

Please feel free to contact me with any questions.

Sincerely,

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American Express Comments to NPRM to Amend Rules of Public Law 89-777 [Docket No. 02-15] (See attached file: 4M9K04!.DOC)

American Express made the following
annotations on 05/29/2003 10:06:59 AM

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May 29, 2003

VIA OVERNIGHT MAIL

Bryant L. VanBrakle
Secretary
Federal Maritime Commission
800 North Capitol Street, NW, Room 1046
Washington, DC 20573-0001
(202) 523-5725

VIA ELECTRONIC MAIL / Return Receipt

secretary@fmc.gov

RE: NOTICE OF PROPOSED RULEMAKING TO AMEND RULES REGARDING THE ESTABLISHMENT OF PASSENGER VESSELL FINANCIAL RESPONSIBILITY UNDER SECTIONS 2 (CASUALTY) AND 3 (PERFORMANCE) OF PUBLIC LAW 89-777

Dear Sir:

This document, submitted by American Express Travel Related Services Company, Inc. ("American Express"), provides the Federal Maritime Commission ("Commission") with comments on the proposed rulemaking referenced above.

American Express recognizes the challenge that the Commission undertakes in proposing amendments to rules and regulations to long-standing law. We appreciate that by issuing the supplementary information and the amended regulation in proposed form, the Commission has provided all interested parties with an opportunity to make meaningful comments. American Express welcomes this opportunity.

American Express supports the aim of the Commission to protect consumers against the risk of nonperformance by passenger vessel operators. We agree with the proposed amendments, to the extent that they (a) eliminate the $15 million ceiling on coverage requirements, and (b) remove self-insurance as a coverage option. However, American Express believes it is essential that the Commission reconsider the scope of unearned passenger revenue that would be covered by a bond, and provide credit card companies, who provide refunds to cardholders, an explicit right of subrogation under the Commission's program.

The proposed amendments implicitly recognize that credit cards are a critically important method of payment for cruises and an important source of protection for consumers. American Express agrees with this principle, but must also point out the additional financial and administrative burdens that both passenger vessel operators and consumers will confront if credit card companies were not given an explicit right of subrogation under the Commission's program. Our comments specifically identify these inefficiencies, redundancies and administrative burdens.

American Express believes that these comments will provide the Commission with important issues to consider and resolve. Should the Commission have any questions with regard to this document, we encourage the Commission to contact Jason Halpern at 212-640-5805. Jason Halpern is an attorney with the American Express General Counsel's Office and can serve as a resource for the Commission.

Thank you for your consideration.

COMMENTS ON PROPOSED RULEMAKING REGARDING THE ESTABLISHMENT OF PASSENGER VESSEL RESPONSIBILITY UNDER SECTION 2 (CASUALTY) AND SECTION 3 (PERFORMANCE) OF PUBLIC LAW 89-777

Comment 1. Elimination of the $15 Million Ceiling

American Express supports the Commission's proposal to eliminate the $15 million ceiling on coverage requirements, and to require PVOs to post coverage with the Commission based on the total amount of unearned passenger revenue ("UPR"), as such term is defined today. For reasons discussed in more detail below, there should be no carve out from UPR for purchases made with credit cards.

American Express also agrees that the increased coverage requirements must be put into place before a PVO begins to experience financial difficulty. Attempts to increase coverage requirements once the PVO is in financial difficulty would only increase the risk of nonperformance to passengers.

Comment 2. Subrogation Rights of Credit Card Companies / Recourse to the Coverage Posted by PVOs with the Commission

Although the proposed rule is otherwise silent on the issue of subrogation, the Commission stated the following in Endnote 8:

> "This proposed rule does not create any right of subrogation to the UPR covered by the program by credit card issuers that have reimbursed passengers for transactions involving excepted passenger revenue. Whatever means credit card issuers use to cover risks posed by excepted passenger revenue or the FCBA is beyond the scope of this proceeding."

American Express urges the Commission to reconsider its position on this issue taking note of the following:

1. What right of subrogation do credit card companies have to the coverage posted by PVOs under the Commission's program?

   American Express' position has been, and continues to be, that credit card companies should have subrogation rights vis-à-vis the coverage posted under the Commission's program. This right of subrogation should exist for any and all credits provided to consumers, irrespective of whether the credit card company was legally obligated to refund the consumer under the Fair Credit Billing Act ("FCBA"). This right of subrogation should apply against any and all forms of coverage, including guaranties, escrow arrangements and surety bonds.

Endnote 8 supports this position, at least in part, since the Commission only explicitly carved out from a credit card company's right of subrogation, those *transactions involving excepted passenger revenue*. The Commission's definition of excepted passenger revenue includes only revenue received by the PVO that a credit card company would be legally obligated to credit to consumers under the Fair Credit Billing Act ("FCBA"). Therefore, the Commission appears to confirm that a right of subrogation exists for credit card companies for credits provided to consumers that the credit card company was not legally obligated to credit to the consumer under the FCBA (e.g. transaction not involving excepted passenger revenue).

For the reasons described in points 2 and 3 below, American Express believes it is very important that the Commission explicitly provide a right of subrogation for credit card companies for credits given to cardholders for cruises purchased but not taken due to a cruise line shutdown or bankruptcy irrespective of whether or not the credit card company is legally obligated to provide the refund. We discuss the reasons for this requested change in points 2 and 3 below.

If no right of subrogation is explicitly provided to credit card companies, then the Commission needs to appreciate the financial impact this decision could have on PVOs.

If credit card companies are not able to seek recourse to the bond coverage posted by PVOs under the Commission's program, then credit card companies will need to fully protect the risk of loss in alternative ways. Credit card companies will require PVOs to post collateral that covers *all unearned passenger revenue* charges with the company's credit cards, some of which the PVO already covers through the Commission's program. While PVOs may perceive this as redundant and as an undue and unnecessary impact on essential operating capital, given the rash of recent bankruptcies and precipitous shutdowns (e.g. American Classic Voyages, Commodore Cruise Lines, Renaissance Cruise Lines, etc.) and the tens of millions of dollars of losses incurred by credit card companies in these cases, credit card companies will have no other alternative but to require the PVOs to post such collateral.

It is important to note that the Commission purposely excluded excepted passenger revenue from the calculation of unearned passenger revenue in the proposed rule because of "the tremendous cost and difficulty that may be faced by some PVOs in covering all UPR" and that requiring coverage for excepted passenger revenue "would be redundant and would impose a needless financial burden" on PVOs. However, since the proposed regulations would shift significant financial risk of PVO business failure to credit card companies, the credit card companies will need to protect this risk appropriately.

While American Express is sensitive to the additional costs associated with requiring collateral from PVOs that is perceived to be "redundant" with the collateral provided under the Commission's program, without an explicit right of subrogation, credit card companies will have no other choice but to require collateral from PVOs to cover all UPR, *even if such collateral covers some of the same UPR as the Commission's program.* The Commission can significantly mitigate the risk of having PVOs post redundant collateral by explicitly providing a right of subrogation to credit card companies under the regulation.

2. Efficiencies Related to Refunding Consumers and Reconciling Claims

Providing credit card companies with an explicit right of subrogation under the Commission's program would create the following efficiencies:

(i) Consumer Refunds – Instead of waiting months or years for full, or in some instances partial, reimbursement via the claims process under the Commission's program, consumers would receive prompt and full refunds from their credit card company on an expedited basis. This would enable the consumer to make use of the funds for an alternative cruise, for investing, for other purposes, etc. What is most important is that the consumer obtains a refund in a much more timely and efficient manner, and has the confidence to continue to purchase travel – an important factor in the United States and world economy.

However, without an explicit right of subrogation, credit card companies may decide to credit only those amounts that are legally required to be credited under the FCBA, and direct the consumer to the Commission's program for reimbursement of the remaining amounts owed (i.e., the amount which credit card companies are not legally obligated to credit to the consumer). This would certainly cause confusion and dissatisfaction for consumers. For example, procedures for reimbursement would differ between the Commission's program and those of credit card companies. Consumers would also be angry that some unusable cruise purchases are credited (i.e., those purchased within 60 days or less in advance) while others (i.e., those purchased more than 60 days in advance) are not.

(ii) Claims Reconciliation – If credit card companies were given the explicit right of subrogation under the regulation and provided that the coverage posted by the PVO under the Commission's program is adequate to cover all UPR, as such term is defined today, credit card companies could confidently refund all amounts to consumers. This would significantly reduce the number of claimants seeking recourse through the Commission's program by hundreds or thousands. And since the credit card companies could provide a comprehensive summary of credits provided to consumers, the reconciliation process with the bonding company handling passenger refund claims under the Commission's program would be vastly more efficient, less cumbersome and less costly to administer than handling thousands of individually documented claims.

Comment 3. Definition of Unearned Passenger Revenue ("UPR") to Exclude Excepted Passenger Revenue ("EPR")

American Express disagrees with the Commission's conclusion that the definition of UPR should exclude EPR. American Express believes that excluding EPR from the definition of UPR will not ultimately achieve the Commission's goal of reducing coverage requirements for PVOs and preserving protections for consumers and consumer confidence in the cruise industry. Moreover, redefining UPR as in the Commission's draft risks confusion and inefficiencies during the claim reconciliation process.

1. Credit Card Companies Would Require PVOs to Cover EPR

The Commission's purpose of excluding EPR from the definition of UPR appears primarily intended to reduce the amount of coverage required from PVOs. While American Express acknowledges that coverage requirements *under the Commission's program* will be reduced if EPR is excluded from the definition of UPR, the PVO's costs associated with covering EPR *will not be reduced at all*. The reason is that if coverage for EPR is not required under the Commission's program, credit card companies will then require PVOs to post collateral to cover EPR. Therefore, in the end, the Commission's goal of alleviating the burden on PVOs will probably not be achieved, and the burdens on the PVO will be exacerbated, as explained below.

If the PVO has to satisfy the Commission's and the credit card companies' need for collateral, the PVO will then need to work with multiple entities to achieve the result of covering all UPR. It would be more efficient for the PVO to work directly with the Commission to cover all UPR (as it is defined today) rather than with these multiple entities. If the Commission is concerned with "redundant" coverage of the EPR, then the Commission could provide that coverage requirements for EPR will be reduced under the program if the PVO can provide evidence to the Commission that the EPR is covered directly with one or more of the credit card companies.

2. Consumer Confusion and Inefficiencies of Claim Reconciliation

As the Commission is probably aware, the majority of consumers deposit upwards of 50% of the cost of the cruise to secure a reservation on the cruise ship months in advance of the actual sailing date. The balance is then typically paid 30, 60 or 90 days before the sailing date. In most instances consumers pay the deposit and balance with a credit card. Under these circumstances, if the PVO ceases operations before fulfilling the services, the passenger would be required to seek recourse through both its credit card company (for the portion of the payment falling within FCBA guidelines) and the Commission's program (for the portion of the payment falling outside of FCBA guidelines) in order to recover the entire amount paid for the cruise.

Interacting with several entities would likely be confusing for the consumer due to differences in the claims reconciliation process of various entities. But if EPR is not covered by the Commission's program, the consumer will have to deal with separate entities. If consumers sought a refund of EPR amounts from the Commission program, they would presumably be directed to the credit card companies for reimbursement. Similarly, if no explicit right of subrogation is provided to credit card companies under the regulation, credit card companies that did not require the PVO to provide collateral to cover all UPR might direct consumers to the Commission's program for reimbursement of non-EPR amounts. This confusion can be easily avoided by including EPR in the definition of UPR and by affording credit card companies an explicit right of subrogation under the regulation.

If EPR is excluded from the definition of UPR, claims that consumers make through the Commission's program, and which claims relate to payments made on credit cards, would need to be analyzed to determine if the amount sought through the program related to EPR. This process would be labor-intensive, cumbersome and costly and will likely delay reimbursement to consumers through the surety bonding company or other entity facilitating consumer claims under the Commission's program. The Commission may not foresee this unintended consequence of excluding EPR from the definition of UPR, but the increased costs on facilitating the claims process and the delay in reimbursing consumers would almost certainly become a reality.

Based on points 1 and 2 above, proposed §540.2 (i)(2) should be stricken from the proposed rule and all references to EPR throughout the proposed rule should be stricken or revised accordingly.

Comment 4. **<u>Reducing the Risks Inherent in the Cruise Line Industry</u>**

The Commission needs to ensure that it has all information from a PVO to determine the initial amount of coverage required under the Commission's Program and when the coverage should be increased. Accordingly, there should be some disincentive if a PVO fails to comply with the reporting requirements described in §540.8 of the proposed rule. While §540.9 will allow the Commission to suspend or revoke a certificate of performance if a PVO fails to comply with the reporting requirement, the Commission may consider assessing a non-compliance fee on a PVO that fails comply with the reporting requirements.

The Commission should also consider whether there are alternative means of protecting passengers. For example, the Commission should explore whether a system could be implemented whereby PVOs honor passenger bookings of another PVO that has gone out of business, similar to interlining in the airline industry.

Comment 5. **<u>The Commission's Program Should Apply to Vessels That Do Not Embark From U.S. Ports</u>**

The Commission's Program should extend to <u>all</u> cruise line operators *that market or advertise to United States citizens*, <u>irrespective</u> of the port from which the cruise line vessel embarks. The Commission's goal is to protect United States consumers and the port where the cruise ship embarks should be irrelevant to this goal.